

- “(1) Whether the Administrative Law Judge exceeded his jurisdiction in this matter.
- “(2) Whether certain defenses apply to include a defense for whether the Court’s award of temporary total disability and medical treatment is due to a work related injury or non-work related condition.”

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds as follows:

Claimant suffered accidental injury on August 21, 1998, when, while moving a paint trailer off of an embankment at a job site with his superintendent, the trailer dropped and the tongue of the trailer landed on claimant's right foot. Respondent does not dispute that claimant suffered injury to his right foot on that date. Respondent, however, objects to ongoing medical treatment and temporary total disability compensation, alleging that claimant's current need for medical treatment does not stem from that accident, but rather from a bunion which was diagnosed by Roger W. Hood, M.D., on the big toe of claimant's right foot. The medical reports contemporaneous with claimant's injury indicated that claimant had pain in his foot and was experiencing difficulty bending his toes. There was swelling and bruising on the top of the foot, just above the toes, with most of the pain centered on the right side of the foot and on the top of the foot.

Respondent contends that the bunion located on claimant's big toe is not connected to the August 21, 1998, injury.

Before proceeding, the Appeals Board must first consider whether it has jurisdiction in this instance. K.S.A. 1999 Supp. 44-551 limits a party's right to appeal from a preliminary hearing order to situations where it is alleged that the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested at preliminary hearing. K.S.A. 1999 Supp. 44-534a allows appeals from preliminary hearings when dealing with specific jurisdictional issues regarding whether the claimant suffered an accidental injury, whether the injury arose out of and in the course of employment, whether notice is given or claim timely made, or whether certain defenses apply.

Respondent argues this is a jurisdictional issue, contending that the dispute centers around whether claimant suffered an accidental injury causing the bunion condition. The Board disagrees. This dispute deals with the nature and extent of claimant's injury and is not an issue over which the Board has jurisdiction from a preliminary hearing order. See Porter v. Clarence M. Kelly Detention, WCAB Docket Nos. 234,065 & 241,160 (July 1999).

Respondent also contends that this constitutes a certain defense under K.S.A. 1999 Supp. 44-534a and is, therefore, jurisdictional. However, the Board has held many times that a "certain defense" is intended to limit the type and character of the defense which can be raised to the Board on an appeal from a preliminary hearing. To be a certain defense as contemplated by K.S.A. 1999 Supp. 44-534a, the defense must go to the compensability of the claim. See Ghramm v. Emporia Construction & Remodeling, WCAB Docket No. 199,776 (Jan. 1996). Examples of those types of defenses would be an

allegation of a willful failure to use a guard or protection or the intoxication defense. No such defense exists here. The Board's analysis has now been adopted by the Kansas Court of Appeals in Carpenter v. National Filter Service, 26 Kan. App. 2d 672, 994 P.2d 641 (1999). The respondent's contention goes to the nature and extent of claimant's injury and is not a jurisdictional issue under K.S.A. 1999 Supp. 44-534a.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Application for Review of respondent in the above matter should be, and is hereby, dismissed, and the Order of Administrative Law Judge Bruce E. Moore dated April 10, 2000, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2000.

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BOARD MEMBER

c: Robert A. Anderson, Ellinwood, KS  
P. Kelly Donley, Wichita, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director